

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA,** )  
 )  
 **Plaintiff,** )  
 )  
**v.** ) **Case No. 05-cv-329-GKF(PJC)**  
 )  
**TYSON FOODS, INC., et al.,** )  
 )  
 **Defendants.** )

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF  
ITS MOTION IN LIMINE TO PRECLUDE EXPERT  
TESTIMONY OF DEFENDANTS' WITNESS CHARLES COWAN PhD  
[DKT #2072]**

The State of Oklahoma ("the State") has moved, pursuant to Fed. R. Evid. 104 and 702, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for an order *in limine* precluding the expert testimony of Defendants' witness Dr. Charles Cowan (Dr. Cowan) regarding his evaluation of Drs. Olsen and Harwood's Principle Component Analysis ("PCA") and Polymerase Chain Reaction ("PCR") work respectively. The State has advanced two arguments supporting its *Daubert* motion. First, the State has shown that Dr. Cowan lacks the essential knowledge and expertise in Environmental Forensics required to opine as to Dr. Olsen's PCA. In their response to the State's motion, Defendants argue that the Court should believe that "statistics is statistics" no matter the scientific discipline that is being analyzed [DKT #2148/2163]. This argument neglects to answer the actual substance of the State's Motion, namely, Dr. Cowan lacks the background and experience in Environmental Forensics that is needed to reliably testify as to Dr. Olsen's application of PCA in this case. Second, the State demonstrated that Dr. Cowan's opinion is unreliable because in his attempt to replicate

Dr. Olsen's dataset, he failed due to his unfamiliarity with environmental data and forensics. This unfamiliarity also resulted in his critiquing a dataset of his own invention rather than Dr. Olsen's. His critique of this "straw man" dataset has no relevance to Dr. Olsen's PCA analysis. Defendants in response argue that despite Dr. Cowan's admissions to the contrary he did, in fact, successfully recreate the dataset. Defendants' arguments in this instance contradict both Dr. Cowan's written report and deposition testimony.

## **I. Discussion**

### **A. Dr. Cowan has changed his opinion regarding Dr. Olsen's treatment of non-detects, use of data averaging and logarithms multiple times indicating his lack of expertise.**

In his report Dr. Cowan initially criticizes Dr. Olsen for substituting half of the detect limit for non-detects rather than simply using zero.<sup>1</sup>

In the data analyzed by Dr. Olsen, he also has a number of values that are non-detects, meaning the measurement method used by the researchers cannot measure any trace measure of a chemical or organic value. Rather than treat this as a zero (not detected), Dr. Olsen substitutes the midpoint between zero and the detect limit for a chemical. However, the detect limits can vary from observation to observation for each chemical. In some samples we would have a smaller non-detect than for others, such as .01 as a lower limit for some observations on Aluminum, and .001 for other lower limits.

See DKT #2072, Ex. A (Cowan Rpt. at p. 26). Despite Dr. Cowan's initial claim, Dr. Olsen's treatment of non-detects is a common, generally accepted and well documented approach. DKT # 2072, Ex. D (Loftis Decl. at ¶ 4). After becoming educated on this common practice in environmental forensics, Dr. Cowan now admits that his critique of

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<sup>1</sup> Often with Environmental Datasets the lab analysis reports a "non-detect." Rarely, if ever, in the dataset involved in the PCA does the non-detect signify an absolute absence of any of the analyte in the sample. Rather, it means that the analytical method used by the lab could not quantify the amount of chemical in the sample.

Dr. Olsen's treatment of non-detects was wrong. Dr. Cowan changed his opinion during his deposition and accepted Dr. Olsen's method.

Q Okay. Now, you testified before lunch I believe that you're not criticizing Dr. Olsen by using the midpoint between zero and the detection limit when he ran his PCA, correct, for non-detects?

A I agree, I am not criticizing him for not using zero. *Using the midpoint between zero and the lower limit of the detection level is an acceptable procedure.*

See DKT #2072, Ex. B (Cowan Depo., 132:4-11) (emphasis added). Later, demonstrating yet another change of opinion, Defendants filed their motion to exclude the PCA testimony of Dr. Olsen *claiming* that Dr. Olsen's treatment of non-detects was improper:

Rather than treat these [non-detects] as demonstrating the absence of the constituent that is being tested, or at least as no evidence of presence or absence, he takes these non-detects to prove the *presence* of the tested for constituent, but just at levels below the analytical method's detection limit. He therefore replaces "non-detect" with the midpoint value between zero and the relevant detection limit. This again has two distorting effects. First, as with the substitution for missing variables, it creates data where none were measured.

DKT #2082, at p. 22-23. Defendants (and Dr. Cowan) have once more changed their mind as to the proper method of treating non-detects. In Defendants' response motion they now claim that Dr. Cowan has never critiqued Dr. Olsen's treatment of non-detects and that his is indeed an acceptable practice.

Dr. Cow[e]n does not take issue with the treatment of non-detects, the use of logarithms, or averaging of data *per se* but rather demonstrates the effect that these practices, when aggregated in the manner that Dr. Olsen did, have on the accuracy with which PCA can measure variability in a dataset.

See DKT #2163, at pp. 5-6. The foregoing highlights three separate instances where Defendants and Dr. Cowan have changed their opinion; each time flatly contradicting the one before. What is clear from the record is that Dr. Cowan (and Defendants) initially offered an opinion critiquing Dr. Olsen's use of non-detects, data averaging and

logarithms, and now having been educated on the relevant environmental forensics, they (and Dr. Cowan) have modified those opinions to the point of agreeing that Dr. Olsen's methods represent "an acceptable procedure." Dr. Cowan no longer seeks to offer a critique of Dr. Olsen's methods relating to the treatment of non-detects, use of logarithms or averaging data, and, in fact, now endorses them. This clearly demonstrates Dr. Cowan's lack of expertise and the necessary qualifications to give an opinion on Dr. Olsen's PCA.<sup>2</sup>

**B. Dr. Cowan lacks sufficient pertinent experience.**

While many Ph.D.s are qualified as experts, it is important for the court to delineate exactly the discipline in which their expertise lies. *See Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 902, (1995). *See also, Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) ("To begin with, we agree with the district court that Dr. Curtis easily qualifies as an expert under Federal Rule of Evidence 702. The real question is, *what is he an expert about?*") (emphasis added); *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 571 (2003), *rev'd in part on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005). This Court when examining an expert's qualifications stated:

*Ralston* and like cases establish that the qualification of the proposed expert is to be assessed only after the specific matters he proposes to address have been identified. The controlling Tenth Circuit cases, exemplified by *Ralston*, establish that the expert's qualifications must be both (i) adequate in a general, qualitative sense (i.e., "knowledge, skill,

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<sup>2</sup> Defendants have filed their own motion to exclude the testimony of Dr. Olsen. *See* DKT #2082. Dr. Cowan's testimony that Dr. Olsen's methods represent an acceptable procedure sharply undercuts Defendants' arguments. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744-45 (3d Cir. 1994) (holding that while opposing counsel and their experts may disagree with an expert's conclusions, so long as his methods are based on good scientific grounds the expert should not be excluded).

experience, training or education" as required by Rule 702) and **(ii) *specific to the matters he proposes to address as an expert.***

*In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1232 & 1245 (N.D. Okla. 2007) (Emphasis added). Defendants -- in an effort to exhibit Dr. Cowan's qualifications -- highlight his education and professional experience which includes Bachelor's degrees in English and Economics, a Master's Degree in Economics and a Ph.D. in Mathematical Statistics. DKT #2163, p. 3; Ex 2 (Cowan Rpt. at p. 2). Importantly, *none* of his courses of study are related to environmental sciences which would assist Dr. Cowan in evaluating Dr. Olsen's environmental forensics PCA analysis. *See* DKT #2072, Ex. A (Cowan Rpt. at Appendix 1, Appendix 2 and Appendix 3); *See also* DKT #2072, Ex. B (Cowan Depo., 7:9-11, 28:6-9, 29:19-24, 37:21-38:19, 48:1-13, 51:11-21, 69:3-70:6, 375:5-20). Dr. Cowan is similar to the expert whose testimony was excluded in *In Re Williams* where in spite of being an expert, he lacked the specific expertise needed to reach his expressed opinions. Dr. Cowan may be qualified as an expert in statistics as applied to economics or the demographics of populations (social sciences) but he is not an expert in the application of statistics to environmental sciences. He candidly admits this.

Defendants attempt to mislead the Court by asserting that "analysis is analysis" and "statistics is statistics" regardless of the scientific context in which it is applied and regardless of how and in what context data is obtained. This simply is not the case. *See* DKT # 2163, at p. 1. Defendants contend the mathematics of PCA is the same regardless of the scientific application. *Id.* The State has never argued that the laws of mathematics differ in environmental PCA; however, it is essential that one understand the data being analyzed and the relevant variables, *i.e.*, one must understand what the samples are

samples of, and what the relevant variables are, in order to properly evaluate the *application* of PCA to the data. *See* DKT # 2072, Ex. D (Loftis Decl. at ¶ 4) Ex. E (Chappell Decl. at ¶¶ 6-7). In this instance, it requires knowledge of environmental science which Dr. Cowan has admitted he lacks. DKT #2072, Ex. B (Cowan Depo., 7:9-11, 28:6-9, 29:19-24, 37:21-38:19, 48:1-13, 51:11-21, 69:3-70:6, 375:5-20). In particular, the PCA analysis offered here requires knowledge of the geochemical behavior of the chemicals in the environment, knowledge Dr. Cowan readily admits he does not have. *Id.* Without such knowledge, an investigator cannot properly evaluate which variables should be included in the PCA. Further, one cannot reliably evaluate the types, quantity, and quality of samples and analytical data required for the PCA. *See* DKT # 2072, Ex. D (Loftis Decl. at ¶ 4) Ex. E (Chappell Decl. at ¶¶ 6-7). To reliably critique Dr. Olsen's PCA in this case an expert must have adequate and integral experience in both the method (PCA) and its application (environmental science and data); Dr. Cowan lacks the latter.

Much of Dr. Cowan's report and deposition testimony demonstrates his lack of experience. Significantly, he admitted that this is the first time in his career he has undertaken an analysis of this type. DKT #2072, Ex. B (Cowan Depo., 29:19-24). To resurrect their witness, Defendants now claim that Dr. Cowan does indeed have experience in Environmental Forensics. DKT #2163, at p. 7-8. However, Dr. Cowan's testimony under oath speaks to the contrary:

Q Have you had any cases where you've actually done an environmental analysis as an expert?

A No.

DKT #2072, Ex. B (Cowan Depo., 7:9-11). Similarly, Dr. Cowan has admitted that he has never performed PCA with a dataset similar to this one. DKT #2072, Ex. B (Cowan Depo., 29:19-24). Despite Defendants' selective citations to the contrary, it is clear from Dr. Cowan's testimony that he does not have the knowledge and experience required.

**C. Dr. Cowan's failure to reproduce Dr. Olsen's dataset – limits his critique to only a dataset of his own making – revealing his ignorance and the lack of relevance of his opinions.**

Defendants in their response now claim that Dr. Cowan offers no opinion regarding environmental science and that the fact that he has done no independent environmental study *actually supports* his credentials. DKT # 2163, at p. 9 ("Dr. Cowan does not purport to perform any environmental analysis: he neither analyzes "sources of contamination" nor speaks to 'environmental issues.'"). Defendants make this curious argument because they recognize that Dr. Cowan is unqualified to opine as an expert in this environmental case.<sup>3</sup>

Contrary to Defendants' present assertion, Dr. Cowan does not restrict his critique to application of the PCA using the PCA datasets; in fact, he attempts to reproduce one of the PCA datasets (SW3) and then builds his critique on his inability to do so. *See* DKT #2163, Ex. 2 (Cowan Rpt. at p. 18). Defendants' response has again put a new spin on Dr. Cowan's original critique. Furthermore, he again changed his opinion. Originally, Dr. Cowan was highly critical of Dr. Olsen's PCA analysis because he was unable to reproduce the PCA datasets. *Id.* Only after he understood that his inability to reproduce the SW3 dataset stemmed from his own lack of experience did Dr. Cowan change his view. He now claims that he was in fact able to reproduce the PCA result. DKT #2163,

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<sup>3</sup> More surprising is the fact that Dr. Cowan is being offered as a rebuttal expert to Dr. Olsen, an expert who routinely uses PCA as well as other environmental forensic tools to investigate causation.

at p. 12-13. Ultimately, each of Dr. Cowan's examples of Dr. Olsen's "errors" or "discrepancies" was shown to be traceable to Dr. Cowan's own lack of experience and knowledge. *See* DKT #2072, pp. 8-9.

Dr. Cowan proceeds to compound his problem by attempting to critique Dr. Olsen's report based on the results of Dr. Cowan's own errant methodology. It follows that Dr. Cowan having failed to accurately reproduce the dataset, any critique of Dr. Olsen's report built on this flawed dataset is itself flawed and unreliable. In other words, Dr. Cowan is not actually critiquing Dr. Olsen's work; instead he is shooting at a target of his own creation, something quite different than the product of Dr. Olsen's work. *See* DKT # 2072, Ex. E (Chappell Decl. at ¶ 11).

Despite Defendants' present claim that Dr. Cowan did successfully reproduce the data set, his declaration actually highlights the difficulties that arise due to his lack of previous scientific experience in this area. In his recent declaration, Dr. Cowan states, "Specifically, I explained that Dr. Olsen's SW3 run cannot be recreated fully and accurately simply by pulling data directly from any one of the many files labeled 'Illinois Master Database.'" DKT # 2163, Ex. 7 (Cowan Decl. at ¶ 6). This suggests that one ought to be able to go directly from the master access database to PCA dataset (SW3) without any interim data treatment. This is a gross distortion of proper scientific method. The master database properly contains only raw data. The raw data must first be extracted and once extracted, it must then be reduced (treated) to create the PCA datasets. This is basic environmental science. The data treatment/reduction steps are described in detail in Dr. Olsen's report, and two files are attached to aid this procedure. DKT #2163, Ex. 1 (Olsen Rpt. at p. 6-35) (Section entitled "Preparing Data for PCA," highlights the

two files 1) PCA\_Main\_Database\_Water.xls and 2) PCA\_Main\_Database\_Solids.xls). Dr. Cowan ignored or did not understand these files. With these files one can trace back and evaluate Dr. Olsen's PCA analysis.

Dr. Cowan fails to acknowledge even the existence of these reduction/treatment files. He either chose to ignore the files or was not aware of their significance in spite of having them in his possession. For example, Dr. Cowan highlights an "error" he claims to have identified involving variables for COLIFORM and ENTERO. DKT #2163, Ex. 7 (Cowan Decl. at ¶ 9). He spends the four pages trying to explain this "error" pointing to sample BS-08:8/23/2005:SW:S:-, urging that the variables are not in the master access database. At the end of this long and convoluted discourse he states, "... we have no way of knowing where the 1000 and .5 value in the SW3 data came from." *Id.* This is simply false and is solely due to Dr. Cowan's lack of expertise. The master access database contains this information. Great care was taken by the State's experts to ensure that every single datum in every single PCA dataset could be traced back to the main database. Had Dr. Cowan understood the process he could have easily avoided his error. *See* DKT #2163, Ex. 1 (Olsen Rpt. at p. 6-35) (Section entitled "Preparing Data for PCA," highlights the two files 1) PCA\_Main\_Database\_Water.xls and 2) PCA\_Main\_Database\_Solids.xls). Since Dr. Cowan ignored these essential steps his critique is flawed and he was unable to retrieve this data. By ignoring these steps Dr. Cowan, once again, has offered a critique that is not truly related to Dr. Olsen's work, but rather a critique of his own invention.

Finally, Dr. Cowan claims he was able to recreate the dataset without following Dr. Olsen's methods by substituting mean values for missing data where Dr. Olsen used

pairwise deletion. DKT #2072, Ex. B (Cowan Depo., 218:13-15). Dr. Cowan claims that these two methods of data substitution are *identical* and thus his dataset is identical to Dr. Olsen's. See DKT #2163, Ex. 4 (Cowan Depo. 273:18-277:20). This is simply not the case and had Dr. Cowan read the SYSTAT manual he would know this.<sup>4</sup> The manual to the program Dr. Cowan purports to be an expert on *does not even recognize* mean substitution as a method for treating missing data. In the manual for SYSTAT Version 10 (the program utilized by Dr. Olsen for this PCA) the pertinent reference to pairwise deletion occurs under the subheading "Missing Data." In this section there is no reference to mean substitution because SYSTAT does not offer that method. It only offers listwise deletion or pairwise deletion neither of which was used by Dr. Cowan. See Exhibit A, SYSTAT 10 Manual, Statistics II, Chapter 1, p. II-3. Since Dr. Cowan did not utilize the functions outlined in the SYSTAT manual used by Dr. Olsen it cannot be said that he actually recreated his dataset, or that he critiqued the correct dataset.

## **II. Conclusion**

WHEREFORE, in light of the foregoing, this Court should enter an order in limine precluding the expert testimony of Defendants' witness Dr. Charles Cowan due to his lack of experience and education pertaining to the subject matter on which he intends to opine and further because his critique of Dr. Olsen's PCA is unreliable.

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<sup>4</sup> SYSTAT is the statistical program package used for PCA analysis.

Respectfully Submitted,

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I hereby certify that on this 19<sup>th</sup> day of June, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Also on this \_\_\_\_ day of \_\_\_\_\_, 2009 I mailed a copy of the above and foregoing pleading to:

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